

October 2006

MJI Publications Updates

Adoption Proceedings Benchbook

**Criminal Procedure Monograph 3—Misdemeanor
Arraignments & Pleas (Third Edition)**

**Criminal Procedure Monograph 8—Felony
Sentencing**

Domestic Violence Benchbook (3rd ed)

Juvenile Justice Benchbook (Revised Edition)

Michigan Circuit Court Benchbook

Update: Adoption Proceedings Benchbook

CHAPTER 2

Freeing a Child for Adoption

2.13 Termination Pursuant to a Step-Parent Adoption

C. Grandparent Visitation

Effective September 18, 2006, 2006 PA 353 amended MCL 722.27b to limit the right to seek grandparenting time following a step-parent adoption to a parent of a deceased parent of the child. Replace the quote of MCL 722.27b(13) at the end of the February 2005 update to page 64 with the following text:

“Except as otherwise provided in this subsection, adoption of a child or placement of a child for adoption under the Michigan adoption code, chapter X of the probate code of 1939, 1939 PA 288, MCL 710.21 to 710.70, terminates the right of a grandparent to commence an action for grandparenting time with that child. Adoption of a child by a stepparent under the Michigan adoption code, chapter X of the probate code of 1939, 1939 PA 288, MCL 710.21 to 710.70, does not terminate the right of the parent of a deceased parent of the child to commence an action for grandparenting time with that child.”

CHAPTER 6

Formal Placement and Action on the Adoption Petition

6.6 Legal Rights and Obligations

Effective September 18, 2006, 2006 PA 352 amended the language of MCL 710.60. On page 205, replace the first paragraph, the introductory phrase to the quote of MCL 710.60(2), and the quote of MCL 710.60(2) with the following text:

MCL 710.60(1) provides that after the entry of an order of adoption, “[t]he person or persons adopting the adoptee then become the parent or parents of the adoptee under the law as though the adopted person had been born to the adopting parents and are liable for all the duties and entitled to all the rights of parents.”

MCL 710.60(2) provides:

“After entry of the order of adoption, there is no distinction between the rights and duties of natural progeny and adopted persons, and the adopted person becomes an heir at law of the adopting parent or parents and an heir at law of the lineal and collateral kindred of the adopting parent or parents. After entry of the order of adoption, except as provided in section 2114(2) of the estates and protected individuals code, 1998 PA 386, MCL 700.2114, an adopted child is no longer an heir at law of a parent whose rights have been terminated under this chapter or chapter XIIA or the lineal or collateral kindred of that parent, nor is an adopted adult an heir at law of a person who was his or her parent at the time the order of adoption was entered or the lineal or collateral kindred of that person, except that a right, title, or interest that has vested before entry of the final order of adoption is not divested by that order.”

CHAPTER 6

Formal Placement and Action on the Adoption Petition

6.7 Grandparent Visitation

Effective September 18, 2006, 2006 PA 353 amended MCL 722.27b to limit the right to seek grandparenting time following a step-parent adoption to a parent of a deceased parent of the child. Replace the quote of MCL 722.27b(13) at the end of the February 2005 update to page 206 with the following text:

“Except as otherwise provided in this subsection, adoption of a child or placement of a child for adoption under the Michigan adoption code, chapter X of the probate code of 1939, 1939 PA 288, MCL 710.21 to 710.70, terminates the right of a grandparent to commence an action for grandparenting time with that child. Adoption of a child by a stepparent under the Michigan adoption code, chapter X of the probate code of 1939, 1939 PA 288, MCL 710.21 to 710.70, does not terminate the right of the parent of a deceased parent of the child to commence an action for grandparenting time with that child.”

CHAPTER 7

Rehearings, Appeals, Rescissions, and Dissolutions

7.9 Dissolution of an Adoption

A. Statutory Basis

Effective September 18, 2006, 2006 PA 352 amended the language of MCL 710.60. On page 234, replace the first paragraph in this sub-section with the following text:

Adoptive parents “become the parent or parents of the adoptee under the law as though the adopted person had been born to the adopting parents and are liable for all the duties and entitled to all the rights of parents.”* MCL 710.60(1).

Effective September 18, 2006, 2006 PA 352 amended the language of MCL 710.60. On page 234, replace the last paragraph in this sub-section with the following text:

MCL 710.60(1) provides that an adoptive parent becomes the parent of the adoptee and MCL 710.28(1)(a) allows a parent to release a child for the purposes of adoption. Therefore, an adoptive parent may release an adopted child for adoption.

*See Section 6.6 for information on the legal rights and obligations of parents.

Update: Criminal Procedure Monograph 3—Misdemeanor Arraignments & Pleas (Third Edition)

Part B—Commentary on Pleas

3.40 Appealing a Plea-Based Conviction

Insert the following text near the middle of page 75 before the paragraph beginning with “A defendant may challenge his or her guilty plea...”:

See *People v William Fitzgerald James*, ___ Mich App ___, ___ (2006), where the Court of Appeals reiterated the ruling in *Halbert v Michigan*, 545 US 605 (2005), that an indigent defendant has the right to appointed counsel for the purpose of seeking leave to appeal to the Michigan Court of Appeals. The Court noted also that, pursuant to *Halbert, supra*, the defendant had “not waive[d] his right to the appointment [of appellate counsel] at the time of entering his guilty plea on the basis of the circuit court’s mere advisement that waiver would occur.” *William Fitzgerald James, supra* at _____. Because no right to appellate counsel existed at the time the defendant pleaded guilty, the defendant could not have “intentionally relinquish[ed] a known right.” *Id.* at _____.

Update: Criminal Procedure Monograph 8—Felony Sentencing

Part X—Selected Post-Sentencing Issues

8.52 Appellate Review of Felony Sentences

C. No Remedy Available, Permitted, or Necessary

Insert the following text after the April 2006 update to page 214:

See e.g., *People v Freeman*, ___ Mich ___ (2006),* where even though the sentence imposed on the defendant was within the guidelines range as calculated without the scoring error, resentencing was required because the trial court referenced a different guidelines range (the guidelines range as calculated using the *incorrect* OV score) when it imposed the defendant's initial sentence.

D. Sentences Imposed Under the Statutory Guidelines

1. Sentences Within the Guidelines Range

See e.g., *People v Freeman*, ___ Mich ___ (2006),* where even though the sentence imposed on the defendant was within the guidelines range as calculated without the scoring error, resentencing was required because the trial court referenced a different guidelines range (the guidelines range as calculated using the *incorrect* OV score) when it imposed the defendant's initial sentence.

*Order for resentencing in lieu of granting leave to appeal the decision in *People v Freeman*, memorandum opinion of the Court of Appeals, issued February 16, 2006 (Docket No. 258261).

*Order for resentencing in lieu of granting leave to appeal the decision in *People v Freeman*, memorandum opinion of the Court of Appeals, issued February 16, 2006 (Docket No. 258261).

Update: Domestic Violence Benchbook (3rd ed)

CHAPTER 9

Statutory Firearms Restrictions in Domestic Violence Cases

9.6 Restrictions Upon Conviction of a Misdemeanor

B. Michigan Restrictions Following a Misdemeanor Conviction

Effective September 18, 2006, 2006 PA 350 amended the language of MCL 28.425b(7)(i). Replace the fifth bullet at the top of page 412 with the following language:

- ♦ Operating an ORV while visibly impaired, MCL 324.81135.

Effective September 18, 2006, 2006 PA 350 amended the language of MCL 28.425b(7)(h). Replace the bulleted list beginning at the bottom of page 412 and continuing through the top of page 414 with the following text:

- ♦ Failing to stop when involved in a personal injury accident, MCL 657.617a.
- ♦ Operating while intoxicated, second offense, MCL 257.625(9)(b).
- ♦ Drunk driving, commercial vehicle, MCL 257.625m.
- ♦ Reckless driving, MCL 257.626.
- ♦ Driving while license suspended or revoked, second or subsequent offense, MCL 257.904.
- ♦ Operating aircraft while under the influence of intoxicating liquor or a controlled substance with prior conviction, MCL 259.185.
- ♦ Hindering or obstructing certain persons performing official weights and measures duties, MCL 290.629.

- ♦ Hindering, obstructing, assaulting, or committing bodily injury upon director or authorized representative under the motor fuels quality act, MCL 290.650.
- ♦ Operating an ORV under the influence of intoxicating liquor or a controlled substance, second or subsequent offense, MCL 324.81134(5) or (6).
- ♦ Operating a snowmobile under the influence of intoxicating liquor or a controlled substance, punishable as a second or subsequent offense, MCL 324.82128(1)(b) or (c).
- ♦ Operating a vessel under the influence of intoxicating liquor or a controlled substance, second or subsequent offense, MCL 324.80177(1)(b).
- ♦ Knowingly or intentionally possessing a controlled substance, MCL 333.7403.
- ♦ Operating a locomotive while under the influence of intoxicating liquor or a controlled substance, or while visibly impaired, MCL 462.353(4).
- ♦ Displaying sexually explicit matter to minors, MCL 722.677.
- ♦ Assault or domestic assault, MCL 750.81.
- ♦ Aggravated assault or aggravated domestic assault, MCL 750.81a.
- ♦ Entering without breaking, MCL 750.115.
- ♦ Fourth-degree child abuse, MCL 750.136b.
- ♦ Accosting, enticing, or soliciting a child for immoral purposes, MCL 750.145a.
- ♦ Vulnerable adult abuse, MCL 750.145n.
- ♦ Solicitation to commit a felony, MCL 750.157b(3)(b).
- ♦ Impersonating a peace officer or medical examiner, MCL 750.215.
- ♦ Illegal sale of a firearm or ammunition, MCL 750.223.
- ♦ Illegal sale of a self-defense spray, MCL 750.224d.
- ♦ Sale or possession of a switchblade, MCL 750.226a.
- ♦ Improper transportation of a loaded firearm, MCL 750.227c.
- ♦ Failure to have a pistol inspected, MCL 750.228.
- ♦ Accepting a pistol in pawn, MCL 750.229.
- ♦ Failure to register the purchase of a firearm or a firearm component, MCL 750.232.
- ♦ Improperly obtaining a pistol, making a false statement on an application to purchase a pistol, or using false identification to purchase a pistol, MCL 750.232a.
- ♦ Intentionally aiming a firearm without malice, MCL 750.233.
- ♦ Intentionally discharging a firearm aimed without malice, MCL 750.234.
- ♦ Possessing a firearm on prohibited premises, MCL 750.234d.
- ♦ Brandishing a firearm in public, MCL 750.234e.

- ♦ Possession of a firearm by an individual less than 18 years of age, MCL 750.234f.
- ♦ Intentionally discharging a firearm aimed without malice causing injury, MCL 750.235.
- ♦ Parent of a minor who possessed a firearm in a weapon free school zone, MCL 750.235a.
- ♦ Setting a spring gun or other device, MCL 750.236.
- ♦ Possessing a firearm while under the influence of intoxicating liquor or a drug, MCL 750.237.
- ♦ Weapon free school zone violation, MCL 750.237a.
- ♦ Indecent exposure, MCL 750.335a.
- ♦ Stalking, MCL 750.411h.
- ♦ Reckless, careless, or negligent use of a firearm resulting in injury or death, MCL 752.861.
- ♦ Careless, reckless, or negligent use of a firearm resulting in property damage, MCL 752.862.
- ♦ Reckless discharge of a firearm, MCL 752.863a.
- ♦ A violation of a law of the United States, another state, or a local unit of government of this state or another state substantially corresponding to a violation described above.

Update: Juvenile Justice Benchbook (Revised Edition)

CHAPTER 24

Appeals

24.10 Appointment of Appellate Counsel

Insert the following text after the July 2005 update to page 486:

The United States Supreme Court, in *Halbert v Michigan*, 545 US 605 (2005), also held that the defendant did not waive his right to appointed counsel for first-level appellate review by entering his plea, because at the time he entered his plea the defendant had no recognized right to appointed appellate counsel that he could elect to forgo. In *People v William Fitzgerald James*, ___ Mich App ___, ___ (2006), the Court of Appeals ruled that the discussion of validity of waiver in *Halbert, supra*, was not dictum and, therefore, must be followed by Michigan courts. Based on this holding, the Court vacated the trial court's opinion and order to the extent that it was inconsistent with this finding.

Update: Michigan Circuit Court Benchbook

CHAPTER 1

General Rules Governing Court Proceedings

1.6 Order to Appear

A. In General

Insert the following text before the first full sentence in the partial paragraph at the top of page 14:

See e.g., *Ewin v Burnham*, ___ Mich App ___, ___ (2006) (MCL 600.1852(2), in part, authorizes Michigan courts to order a person residing or who is found in Michigan “to give his testimony or statement or to produce documents or other things for use in a proceeding in a tribunal outside this state”).

CHAPTER 2

Evidence

Part I—General Matters (MRE Articles I, II, III, V, and XI)

2.4 Foundation

B. Requirement of Authentication or Identification—MRE 901

In an order dated September 14, 2006, the Michigan Supreme Court reversed the Court of Appeals' ruling in *People v Jambor (Jambor I)*, 271 Mich App 1 (2006). *People v Jambor (Jambor II)*, ___ Mich ___ (2006). The Court held that “[t]he exhibits were sufficiently authenticated as fingerprint cards relating to the offense, containing complaint number, address, signature of the preparing officer, and were referenced and described in a report prepared by the officer as confirmed by a witness whose credibility was not questioned, thereby satisfying MRE 901. The Court remanded the case to the Court of Appeals for consideration of the remaining issues raised by the parties in the appeal and cross-appeal filed in the Court of Appeals. *Jambor II*, *supra* at ___.

CHAPTER 3

Civil Proceedings

Part I—Pleadings, Parties, and Commencement of Action (MCR Subchapters 2.000–2.200)

3.1 Jurisdiction and Venue

E. Constitutional Limitations

When personal jurisdiction is authorized by MCL 600.701(3) and MCL 600.745, and the parties consent via a valid forum selection clause to personal jurisdiction in Michigan, enforcement of the forum selection clause “does not violate due process so long as a party will not be deprived of its day in court.” *Lease Acceptance Corp v Adams*, ___ Mich App ___, ___ (2006).

Pursuant to MCL 600.701(3) personal jurisdiction can be established by “[c]onsent, to the extent authorized by the consent and subject to the limitations provided in [MCL 600.745].” *Lease Acceptance Corp, supra* at ___. MCL 600.745(2) provides that if the party’s consent “provides the only basis for the exercise of jurisdiction, a court of this state shall entertain the action” if all of the requirements enumerated in MCL 600.745 are satisfied. *Lease Acceptance Corp, supra* at ___.

G. Standard of Review

Insert the following text before Section 3.2 near the top of page 135:

A trial court’s decision as to whether Michigan is a reasonably convenient place for trial under MCL 600.745(2)(b), is reviewed for an abuse of discretion. *Lease Acceptance Corp v Adams*, ___ Mich App ___, ___ (2006). Therefore, “as long as the trial court’s decision falls within a ‘principled range of outcomes,’ the decision on that subissue must be affirmed.” *Id.* at ___ (citation omitted).

CHAPTER 3

Civil Proceedings

Part V—Trial (MCR Subchapter 2.500)

3.43 Subpoenas

A. In General

Insert the following text after the second sentence in this subsection on page 224:

See e.g., *Ewin v Burnham*, ___ Mich App ___, ___ (2006) (MCL 600.1852(2), in part, authorizes Michigan courts to order a person residing or who is found in Michigan “to give his testimony or statement or to produce documents or other things for use in a proceeding in a tribunal outside this state”).

CHAPTER 3

Civil Proceedings

Part VII—Rules Governing Particular Types of Actions (Including MCR Subchapters 3.300—3.600)

3.62 Contracts

G. Third Party Beneficiary

On page 256, insert the following case summary after the existing text in this subsection:

In general, although a property owner ultimately benefits from the work performed by a subcontractor on the property owner's property, the property owner is not an intended third-party beneficiary of the contract between the general contractor and the subcontractor. *Kisiel v Holz*, ___ Mich App ___, ___ (2006). "Absent clear contractual language to the contrary, a property owner does not attain intended third-party-beneficiary status merely because the parties to the subcontract knew, or even intended, that the construction would ultimately benefit the property owner." *Id.* at ___ (citations omitted). As a result, a property owner generally cannot sue for breach of contract a subcontractor who performed work on the property owner's property. *Id.* at ___.

CHAPTER 4

Criminal Proceedings

Part IV—Pleas (MCR Subchapter 6.300)

4.35 Withdrawal of a Guilty Plea

G. Appealing a Guilty Plea

Insert the following text after the January 2006 update to pages 394–395:

See *People v William Fitzgerald James*, ___ Mich App ___, ___ (2006), where the Court of Appeals reiterated the ruling in *Halbert v Michigan*, 545 US 605 (2005), that an indigent defendant has the right to appointed counsel for the purpose of seeking leave to appeal to the Michigan Court of Appeals. The Court noted also that, pursuant to *Halbert, supra*, the defendant had “not waive[d] his right to the appointment [of appellate counsel] at the time of entering his guilty plea on the basis of the circuit court’s mere advisement that waiver would occur.” *William Fitzgerald James, supra* at _____. Because no right to appellate counsel existed at the time the defendant pleaded guilty, the defendant could not have “intentionally relinquish[ed] a known right.” *Id.* at _____.

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

B. Sentencing Guidelines

Insert the following text after the April 2006 update to page 449:

See e.g., *People v Freeman*, ___ Mich ___ (2006),* where even though the sentence imposed on the defendant was within the guidelines range as calculated without the scoring error, resentencing was required because the trial court referenced a different guidelines range (the guidelines range as calculated using the *incorrect* OV score) when it imposed the defendant's initial sentence.

*Order for resentencing in lieu of granting leave to appeal the decision in *People v Freeman*, memorandum opinion of the Court of Appeals, issued February 16, 2006 (Docket No. 258261).

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

F. Appeal Rights

Insert the following text before the January 2006 update to page 455:

See *People v William Fitzgerald James*, ___ Mich App ___, ___ (2006), where the Court of Appeals reiterated the ruling in *Halbert v Michigan*, 545 US 605 (2005), that an indigent defendant has the right to appointed counsel for the purpose of seeking leave to appeal to the Michigan Court of Appeals. The Court noted also that, pursuant to *Halbert, supra*, the defendant had “not waive[d] his right to the appointment [of appellate counsel] at the time of entering his guilty plea on the basis of the circuit court’s mere advisement that waiver would occur.” *William Fitzgerald James, supra* at _____. Because no right to appellate counsel existed at the time the defendant pleaded guilty, the defendant could not have “intentionally relinquish[ed] a known right.” *Id.* at _____. However, the Court of Appeals expressly stated that it did not decide whether, under *Halbert*, a defendant *could* waive the right to appointed counsel “under appropriate circumstances.” *William Fitzgerald James, supra* at _____.

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.61 Post-Appeal Relief

E. Relief

The Michigan Supreme Court did not adopt the proposed amendments to MCR 6.508. ADM File No. 2003-04, issued June 26, 2006, effective September 1, 2006. Therefore, delete the asterisk (and the corresponding margin text) after “MCR 6.508” in the second paragraph of this subsection on page 471.